

## SB 122

## Montana SAFE act

## Testimony of Kelly O'Sullivan

Since 2004, the Division of Banking and Financial Institution has regulated mortgage broker businesses, individual mortgage brokers and mortgage loan originators working for mortgage brokers. Since 2008, Division has regulated mortgage lender entities.

In 2008 when SAFE passed, the Division began looking at our existing laws, the SAFE act, the model act and how to put them all together.

SB 122 is the product of that effort.

It is the model law developed by the Conference of State Bank Supervisors and American Association of Residential Mortgage Regulators and approved by the office of Housing and Urban Development.

We added provisions for licensing mortgage broker and mortgage lender entities because Montana already licenses those entities.

We also looked at the other statutes the Division administers and realized two other statutes must be amended because the definitions in the SAFE Act are broader than those in existing law. They are the Retail Installment Sales Act and Consumer Loan act.

After the Division developed SB 122 we asked CSBS to review it for compliance with SAFE. On January 13, 2009, Chuck Cross of CSBS said SB 122 meets the requirements of SAFE.

## SB 122

(Offer amendments to SB 122.)

The definitions in Section 3 include:

**Mortgage loan originator** (page 5 line 12) an individual who for compensation or gain:

Takes a residential mortgage loan application or

Offers or negotiates terms of residential mortgage loan.

Excludes clerical duties and timeshares and real estate brokers.

**Residential mortgage loan** (p. 6 line 19) a loan primarily for personal, family, or household use secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real estate upon which a dwelling is intended to be constructed.

**Dwelling** (p. 3 line 30) one to four family units, whether attached to real property or not. The term includes a trailer or mobile home if used as a residence.

## Amendments

To clarify that mortgage brokers and mortgage lenders are entities not individuals.

Realtors asked that they be taken out of the definition of mortgage loan originator, separately defined, and excluded from the provisions of this bill. That has been done by amendment.

**Section 4** Requires licensure of all entities acting as mortgage lenders and branches, mortgage brokers and branches and individuals acting as mortgage loan originators.

## **Section 5** Exemptions

A mortgage loan originator working for a depository institution or a wholly owned subsidiary of a depository institution or an institution regulated by the farm credit administration must be registered. This is not done by the states. It is under the FFIEC (federal financial institution examination council).

Depository institutions, wholly owned subsidiaries of a depository institution and an institution regulated by the farm credit administration should be exempt as well. Offer amendment.

### **Other exemptions**

An individual who offers or negotiates a mortgage loan with or on behalf of an immediate family member "of the individual." (By amendment.)

An individual who offers or negotiates a mortgage loan secured by a dwelling that served as his residence.

Entity exemption by rule for Habitat for Humanity, agencies of U.S. government, or state (Board of Housing) or municipal authority.

A licensed attorney who negotiates the terms of a mortgage loan on behalf of a client as part of his representation of the client unless the attorney is compensated by a mortgage lender, mortgage broker, a mortgage loan originator, or any agent of the mortgage lender, mortgage broker, a mortgage loan originator.

A person that only performs real estate brokerage activities and is licensed or registered pursuant to 37-51-301, unless the person is compensated by a mortgage lender, mortgage broker, a mortgage loan originator, or any agent of the mortgage lender, mortgage broker, a mortgage loan originator. (By amendment.)

## **Section 7** loan processor and underwriters

Can't advertise or hold themselves out to the public as a mortgage loan originator. Must be licensed if they are independent contractors, see definition of loan processor in SAFE.

## **Section 8**

Authorizes the Commissioner to participate in NMLS (Nationwide mortgage licensing system) which is required by SAFE.

Currently 24 states use the NMLS licensing system. Nationwide system to allow individuals and entities to quickly and easily enter licensing information, check a box regarding the states in which the individual seeks licensure and submit the application.

Based on securities licensing system.

Authorizes Commissioner to adopt rules for background checks, criminal history information, and civil or administrative records and credit history as well as other information necessary for NMLS as well as fees.

NMLS charges fees as follows **for 2008**:

Initial set up fee	Annual fee	Transfer fee
Entity \$100	Entity \$100	
Branch \$20	Branch \$20	
Individual \$30	Individual \$30	Individual \$30

Commissioner currently has the ability to set fees by rule commensurate with the cost of administering the program that is retained in this bill.

Commissioner can set reporting and renewal dates by rule as well as procedures for amending and surrendering licenses and a complaint procedure for individuals.

Fees must be deposited into special revenue account for department use in administering the program, which is currently in both the mortgage broker and mortgage lender laws. The Division is self-funded through fees.

## **Section 9**

Provides for five types of licenses. Mortgage lender, mortgage lender branch, mortgage broker, mortgage broker branch and mortgage loan originator. Montana has licensed mortgage loan originators working for mortgage brokers in the past but not mortgage loan originators working for mortgage lenders.

An entity can apply for dual licensure.

## **Section 10**

Each entity must license main office and each branch.

Each office location must have designated manager. This is from the mortgage broker act, which requires one designated manager per company. It doesn't work well, a designated manager in Kalispell can't adequately supervise someone across the state. So in this bill a designated manager is required for each office.

Designated manager must have 3 years of experience which is a mortgage broker under existing law. A mortgage loan originator must have 6 months experience which a mortgage loan originator under existing law.

The designated manager is responsible for the conduct at the location where they work. The entity is responsible for supervision of all its employees. This is new.

Under the SAFE act as technically written as the individual must have surety bond or net worth. HUD agreed to accept the entity as the holder of the surety bond or net worth. If the entity has the surety bond, they must be responsible for actions of their employees in order to attach liability to the entity for actions of employees to use the bond.

Gives the commissioner authority to adopt rules regarding the departure of designated managers, matters of which the licensee must notify the Commissioner and when, and form and content of the application for each type of license.

### **Section 11**

#### **Requirements for entity licensing**

The individuals that are the ultimate equity owners or control persons of the entity must meet same requirements as an individual applying for a license. This is currently in the mortgage lender law.

### **Section 12**

Allows for dual licensure of entities.

### **Section 13 Registered Agent for service of process**

New provision, from the Montana Securities Act.

If licensee does not have a physical presence in Montana, they must appoint the Commissioner as registered agent for service of process. It allows the Commissioner to serve licensees at their last known address. Out-of-state licensees need to keep their current address on file.

### **Section 14 Surety Bond**

SAFE act requires a mortgage loan originator to be covered by a surety bond or net worth but allows the entity for whom the individual works to hold the bond or net worth instead of the individual. Montana uses surety bonds for both the current mortgage broker and mortgage lender licensing acts.

The bond will be a sliding scale surety bond based on dollar amount of loans originated, as required by SAFE. Amendment "exclusive agent" not "independent contractor"

### **Section 15 and 16**

SAFE act requires 20 hours of prelicensing education with courses and providers approved by NMLS.

SAFE act requires prelicense testing of all mortgage loan originators with a passing grade of 75%

The test must be developed by NMLS

### **Section 17 License application**

Allows the commissioner to adopt rules on license forms and content, the forms will be the NMLS forms.

Requires applicants to submit information to meet federal requirements to NMLS

### **Section 18 Issuance of license**

Prohibits the Commissioner from issuing a license unless the commissioner finds:

(a) (b) and (c) are from SAFE act

(a) The applicant has never had a mortgage loan originator license, mortgage broker license, mortgage lender license, or the equivalent revoked in any governmental jurisdiction.

- (b) (i) The applicant has not been convicted of or pled guilty or nolo contendere to a felony in a domestic, foreign, or military court:
- (A) during the 7-year period preceding the date of the application for licensing; or
  - (B) at any time preceding the date of application if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering.
- (c) The applicant has demonstrated financial responsibility, character, and general fitness to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently within the purposes of SB 122.

SAFE act requires an independent credit report from credit reporting agency for each applicant. There was concern that would regulators require a certain credit score for licensure. To prohibit that, the model law states that financial responsibility will be demonstrated by:

No outstanding judgments, except solely as a result of medical expenses  
Outstanding tax liens or government liens  
No foreclosures for past 3 years  
Seriously delinquent accounts for the past 3 years.

#### **Section 19 denial or refusal of license**

If applicant does not meet the requirements of this bill or makes a material misstatement of fact or material omission of fact on an application. May not reapply for 1 year following denial or refusal of application

#### **Section 20 license effective date**

License not effective if the mortgage loan originator is not employed by a licensed entity. This is not new to mortgage brokers. The Division must be notified if mortgage loan originator is no longer employed by an entity. Mortgage loan originators may only work for 1 licensed entity at a time. The wind down procedures are new. We have had mortgage lenders go out of business and literally disappear, records and all. Under this provision, they must give us thirty days notice before ceasing business and tell us where the records will be kept.

#### **Section 23**

Annual renewal of licenses

Continuing education of 8 hours per year is required by SAFE act. Montana had 12 before.

#### **Section 25**

The right to challenge is required by SAFE act

#### **Section 26**

Commissioner may by rule establish transition rules and provisional licenses. The Division needs to transition to Dec 31 renewal date under the NMLS system. June 30 is the current expiration date for mortgage brokers and mortgage loan originators. September 30 is the expiration date for mortgage lenders.

#### **Section 27**

Mortgage call reports required by SAFE act to be submitted to the NMLS which includes lenders and brokers.

### **Section 28 disclosure requirements**

The federal landscape is changing quickly and the mortgage marketplace is changing even quicker. Need to be able to adopt rules to keep up in changing environment.

### **Sections 29, 30, 31, 32 technical requirements for:**

Contracts between mortgage lenders, mortgage brokers, mortgage loan originators and borrowers.

Escrow or trust funds

Recordkeeping requirements

Changes in control

### **Section 33 duties of mortgage loan originators**

One of the purposes of the SAFE act is to establish a means by which residential mortgage loan originators would to the greatest extent possible be required to act in the best interest of the consumer.

May not compromise the borrower's right or interest in favor of another.

Shall disclose all material facts known to the mortgage loan originator that might reasonably affect the borrower's right or ability to receive the intended benefit from the mortgage loan. (balloon payments, prepayment penalties, negative amortization loans etc.)

Written account of money and property received by the mortgage loan originator.

Can contract for fees if properly disclosed.

### **Section 34 Violations of federal law**

We currently examine for these federal laws that are applicable to mortgage lenders and mortgage brokers but in the rulemaking were told that by legislative services that we need specific state authority to enforce them. SAFE requires that the state authority have the ability to suspend, terminate or revoke licenses for a violation of state or federal law.

### **Section 35 Prohibited acts**

Is a list of prohibitions like unfair and deceptive practices, scheme to defraud, conducting business without a license, failing to make required disclosures, attempting to influence appraisers as to the value of a property, making a prepayment penalty that extends beyond two years, failing to pay fees, retaining third party fees in excess of the actual third party costs.

### **Section 36 Investigation and examination authority**

The Division has always had investigation and examination authority. But the authority to pull credit on initial application is new and required by SAFE. The Division is currently a criminal justice agency by governor's order, we are putting it into statute. It is needed to receive and share confidential criminal justice information.

Cost of investigation or examination must be set by rule to cover actual cost. Division is a self funding agency. Fees paid by licensees are used to fund the program.

Examination reports are issued on examination, licensee must respond within 30 days.

### **Section 37**

Same authority under current law

**Section 38 Confidentiality under SAFE act**

Any information submitted to NMLS retains the confidentiality it had when it was submitted. Information may be shared with other state and federal regulatory officials without loss of privilege.

Information that is confidential is not subject to disclosure under federal or state law under a public disclosure law. Nor is it subject to subpoena, discovery, or admission into evidence in any proceeding unless the person to whom it pertains waives the privilege.

Montana law relating to disclosure of information is superseded by federal law

Does not apply to the public portion of NMLS, employment history, and publicly adjudicated disciplinary history

**Section 39 Actions on bonds**

New section

Commissioner or anyone injured by a violation of the Act can bring an action on bond. Claims of borrowers take precedence over claims of the commissioner and nonborrowers. If the bond is not enough, claims are prorated.

After borrowers paid, others are paid. If the bond is not enough, claims are prorated.

**Section 40 Failure to comply with reporting requirements**

The penalty for not filing required reports is \$100 a day up to \$1000. And thereafter, the Division can suspend or revoke a license.

**Section 41 Enforcement authority**

The Division has always been able to suspend, deny or revoke, the ability to condition licenses is new. Cease and desist authority has existed since 2007. Civil penalties are not new. MAPA notice and opportunity for hearing are not new.

**Section 42 Penalty**

Civil penalty of \$25,000 per violation. MAPA notice and hearing required

**Section 43 Criminal penalties for mortgage fraud**

Scheme or device to defraud

Fraud or deceit

Material misstatement of fact with the intention that another rely on it

Receive proceeds from above

False or misleading documents with Commissioner

Aids and abets

**Section 44 Institution of criminal proceedings**

Commissioner may refer a matter to a county attorney, attorney general or law enforcement.

**Section 45 Disposition of penalties, fees and costs**

Costs and fees will be used to fund the program. Excess is transferred to general fund. Montana owes \$58,000 to NMLS as its share of the initial set up costs. Montana will use fees and penalties to fund this expense.

**Sections 46**

Requires reporting of violations to NMLS required by SAFE.

The definition of residential mortgage loan is broader than it used to be. It used to be that a person could buy a recreational vehicle on time and that was not considered a mortgage now it is, if the recreational vehicle used as a dwelling.

Amendments to the retail installment sales act.

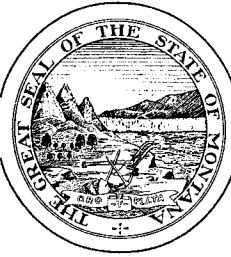
Retail installment sale act applies to holders of contracts for goods purchased on credit.  
Need to amend to remove dwellings that are now under the SAFE act.

Consumer loan act

In Montana, we used to be able to do a loan for personal or family purposes and secure it with real property. Now it is under SAFE. The amendments to remove references to mortgage loans from consumer loan act.



DEPARTMENT OF ADMINISTRATION  
DIVISION OF BANKING AND FINANCIAL INSTITUTIONS



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February 12, 2009

Senator Joe Balyeat, SD 34  
Montana Senate  
Capitol Building  
P.O. Box 200500  
Helena, MT 59620

RE: Senate Bill 122

Dear Senator Balyeat:

The Division of Banking and Financial Institutions (Division) appreciates your consideration of Senate Bill 122 (SB 122). Enclosed please find the following:

1. Response to your request from the Conference of State Bank Supervisors (CSBS) in providing specific findings of Senate Bill 351 noncompliance with the federal SAFE Act.
2. Rulemaking summary in which the Division is offering amendments to delete certain rulemaking authority and move rulemaking provisions into SB 122.
3. Amendments to SB 122 in response to the Montana Association of Mortgage Broker's testimony including continuing education, the revocation provision and defining surety bond requirements in statute.
4. Press release issued by CSBS marking successful first year in operation of Nationwide Mortgage Licensing System.
5. Letter from Gavin Gee, Director Idaho Department of Finance, regarding their legislative repeal and replace proposal to comply with the federal SAFE Act.

If you should have any questions, please contact me.

Sincerely,

Handwritten signature of Annie M. Goodwin in cursive.

Annie M. Goodwin, Commissioner  
Division of Banking and Financial Institutions

c: Members, Senate Business, Labor and Economic Affairs Committee  
Senator Larry Jent



February 10, 2009

Annie M. Goodwin, Commissioner  
Division of Banking and Financial Institutions  
301 South Park, Suite 316  
P.O. Box 200546  
Helena, MT 59620

Re: Montana Association of Mortgage Brokers (MAMB) proposed bill LC 1932 (now SB 351) for implementation of the S.A.F.E. Act

Dear Ms. Goodwin:

The S.A.F.E. Mortgage Licensing Act of 2008 (SAFE) establishes federal minimum standards of licensing or registration for individuals meeting the definition of loan originator or registered loan originator. SAFE provided that States have a period of time to update their laws to meet the new federal standards, and allocated responsibility to the Department of Housing and Urban Development (HUD) to determine if a state meets the minimum requirements.

The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) supported the passage of SAFE and shared Congress' desire to set minimum standards that would apply nationwide. CSBS and AARMR developed a model state law to provide states with a template to update their mortgage legislation as soon as possible in a uniform fashion and in a manner consistent with SAFE. On December 24, 2008, HUD issued its interpretation of SAFE as it would apply to the model state law and opined; "HUD reviewed the model legislation to determine whether it meets the minimum requirements of the SAFE Act and finds that it does. State legislation that follows the provisions of the model legislation, whether by statute or regulation, will be determined to have met the applicable minimum requirements of the SAFE Act."

You have asked me to review MAMB proposed bill LC 1932 (now SB 351) as alternative language to SB 122, the Montana Secure and Fair Enforcement for Mortgage Licensing Act of 2009. As I informed you in a correspondence dated January 9, 2009, SB 122 complied with both the Model State Law and SAFE in every respect. We have reviewed the provisions contained in SB 351 and find that it not only runs afoul of the model state law, but in our legal reading will put your state in serious non-compliance with SAFE itself. In general, SB 351:

- Lacks authorization for the Montana Division of Banking and Financial Institutions to participate in the Nationwide Mortgage Licensing System (NMLS);
- Lacks NMLS fee requirements;
- Lacks the requirement for the state to report violations;
- Contains modified definitions, or lacks definitions, that cause non-compliance with SAFE;

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- Does not provide adequate coverage of all individuals required to be covered under SAFE;
- Has potentially unworkable language for the use of NMLS as a channeling agent with the FBI;
- Has the affect of offering exemptions disallowed by SAFE;
- Contains requirements or language violating SAFE for testing, education, education course approval, license revocation, and bonding.

More specifically, CSBS is responding to Chair, Senator Joe Bayleat's request of specific problems and concerns with SB 351:

1. Under 32-9-130. Department authority – rulemaking (2)(e) and (f), the authority to approve tests and education has been granted by Congress only to CSBS and AARMR through the NMLS. Provided that any rulemaking proposed by this section transferred the authority to the NMLS, this may not be a problem. However, SAFE and the MSL already set this requirement in a very straightforward manner and the implication that the authority lies with the agency is misleading.
2. The definition of “mortgage loan originator” does not comply with SAFE. By narrowing the definition to “employed by a mortgage broker,” SB 351 limits the intended coverage of SAFE. This limitation not only affects coverage for non-employee mortgage loan originators, but loan originators working for entities other than mortgage brokers as well. The definition also defines mortgage loan originator as an individual “who is licensed by the state,” meaning that an individual operating without a license would not meet the definition of mortgage loan originator. Further, the definition so modifies both the original SAFE definition and the more restrictive MSL definition that it is difficult to ascertain how far from compliance the definition might be found to be by HUD.
3. The definition for “loan processor or underwriter” lacks the requirement that the individual be a W2 employee of either a licensee or a person exempt from licensing. While this in itself does not violate SAFE, it creates unnecessary confusion. Loan processors and underwriters paid as independent contractors must be licensed as mortgage loan originators under both SAFE and the MSL.
4. The modification of the definition of “registered mortgage loan originator” creates unnecessary confusion. The sole purpose of the definition in state law is to offer an exemption that exists in SAFE. By altering the definition, SB 351 runs the risk of altering the exemption. While this may not violate SAFE, it certainly may confuse industry participants attempting to determine coverage in Montana.
5. The definition of “residential mortgage loan” does not comply with SAFE. This definition controls the entire federal law and therefore the state law. By excluding the phrase “upon which is constructed or intended to be constructed a dwelling (as so defined)”, SB 351 limits the coverage significantly.
6. The exclusion of the definition of “residential real estate” from Montana law assists the violation of SAFE identified in number 5 above.
7. The modification of both the exemptions for loans offered or negotiated by family members and for loans in the sale of a residence, does not meet the exemptions approved by HUD. HUD negotiated only three additional exemptions with the States that would be acceptable in their review of a state's SAFE law (see HUD interpretive letter December 24, 2008 and Federal Register Vol. 74, No. 2, January 5, 2009). SB 351 truncates important qualifiers within these exemptions.

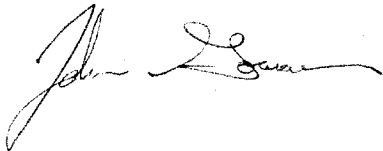
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8. New Section 14. Compliance of current mortgage brokers and mortgage loan originator licensees with background check and minimum standards, does not employ the SAFE required language for fingerprint checks. The modifications and eliminations in SB 351 may prohibit Montana from participation in the NMLS (a base requirement of SAFE), and may hinder access to the background information from the FBI. Further, SB 351 contemplates using previous fingerprints on file to meet the background requirements. This would not be acceptable under SAFE, the MSL or NMLS requirements as there is no assurance that an individual has not subsequently become a convicted felon.
9. The license renewal proposal in SB 351 is unacceptable under SAFE because it effectively "stays" the bans or restrictions associated with certain individual backgrounds until a renewal has been requested. In other words, a mortgage loan originator in Montana may operate in violation of SAFE until the time of renewal. While in practice this may effectively be the result, CSBS cautions making such statements or implications within the law.
10. Montana law does not have the ability to determine that a "revocation" is not a revocation under SAFE. A revocation is determined by the state entering the revocation and such limitation is a violation of SAFE.
11. SB 351 provides a waiver of examination and education requirements that are not in compliance with SAFE.
12. SB 351 defines "approved test provider" as a test provider "approved by the department." Under SAFE, only the NMLS holds the authority to approve test providers.
13. The mortgage call report requirement has been limited to mortgage brokers only. Such a limitation is insufficient under SAFE.
14. The "surety bond, irrevocable letter of credit, or net worth requirement" section has two problems. First, it does not cover mortgage loan originators, which is a SAFE requirement. Second, there is no authority under SAFE to employ an irrevocable letter of credit, or any type of instrument pledge other than a surety bond, net worth or a recovery fund.

As you may be aware, a state found to be in non-compliance with SAFE will result in HUD not recognizing the state's supervision and requires HUD to set up a new regulatory regime for a non-compliant state. We believe that the proposed language would clearly trigger HUD intervention in Montana and strongly encourage you to oppose this amendment. In general, CSBS encourages states to adopt the model state law into the appropriate existing sections of the state statute. As stated previously in this letter, HUD has made a formal finding that the model state law complies with SAFE in every respect, and in effect has provided a "safe harbor" for any state adopting this language.

Sincerely,



John Gorman  
General Counsel, Conference of State Bank Supervisors

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